



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

FIFTH SECTION

CASE OF KYSILKOVÁ AND KYSILKA v. THE CZECH REPUBLIC

(Application no. 17273/03)

JUDGMENT

This version was rectified on 30 March 2011
under Rule 81 of the Rules of the Court

STRASBOURG

10 February 2011

FINAL

10/05/2011

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

In the case of Kysilková and Kysilka v. the Czech Republic,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska,
Julia Laffranque, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 18 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 17273/03) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Czech nationals, Ms Radmila Kysilková and Mr Zdeněk Kysilka (“the applicants”), on 23 May 2003.

2. The applicants were represented by Mr J. Mazal, a lawyer practising in Písek. The Czech Government (“the Government”) were represented by their Agent, Mr V.A. Schorm, from the Ministry of Justice.

3. The applicants alleged, in particular, that they had not had a public hearing by an independent and impartial tribunal during the whole proceedings and that they had not been able to make comments on the written observations submitted by the presiding judge at the Regional Court which had been used in the decision of the Constitutional Court.

4. On 7 February 2006 the President of the former Second Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1927 and 1936 respectively and live in Písek.

6. On 16 January 2002 a certain S., the applicants' neighbour, received a building permit to build an apartment building.

7. The applicants appealed against the permit, and on 23 April 2002 the Písek District Office (*okresní úřad*) partly modified it. The District Office did not hold a hearing.

8. On 29 April 2002 the applicants, through their legal representative, filed an action against the administrative decision (*žaloba proti správnímu rozhodnutí*) with the České Budějovice Regional Court (*krajský soud*), requesting, at the same time, postponement of the building of the flats

9. In a decision of 23 May 2002 the Regional Court invited the applicants to give reasons, within ten days, for their request for the building permit to be suspended. The court also provided the applicants with the following notice:

“The court invites the party to the procedure to clarify whether he agrees to it proceeding without a public hearing ... on the basis of the documents submitted by the parties (Article 250f § 1 (b) of the Code of Civil Procedure). If no reply to this notice is received within the statutory time-limit, the court will assume that the party to the procedure does not oppose the court deciding without a hearing (Article 250f § 2 of the Code of Civil Procedure).”

10. The applicants were represented in the proceedings by counsel on the basis of a procedural power of attorney (*procesní plná moc*) and the decision was served on him on 24 May 2002. Apparently, the representative's son collected the court's decision instead of the representative himself. No reply was sent to the court within the fifteen-day time-limit.

11. On 14 June 2002 the Regional Court dismissed the applicants' action. It did not hold a public hearing, assuming that the applicants, not having responded to the court's notice, agreed to such a procedure.

12. On 27 August 2002 the applicants lodged a constitutional appeal (*ústavní stížnost*) alleging, *inter alia*, a violation of Articles 6 and 13 of the Convention and Articles 35 and 38 of the Charter. They further requested that Article 250a of the Code of Civil Procedure be repealed.

13. In her written observations of 3 October 2002, the presiding judge at the Regional Court submitted that the court had dealt with the arguments the applicants had put forward in their action and had applied Article 250f of the Code of Civil Procedure, having informed the applicants' legal representative about their procedural rights and duties in conformity with that provision.

14. On 5 December 2002 the Constitutional Court (*Ústavní soud*), without holding a public hearing, rejected the applicants' appeal as manifestly ill-founded. It included the written observations of the presiding judge at the Regional Court on the applicants' constitutional appeal in its summary of the facts. The court found that the Regional Court had reviewed the decision of the District Office of 23 April 2002, had rightly proceeded under Article 250f § 1b) of the Code of Civil Procedure and had

exhaustively dealt with all the arguments raised by the applicants after having interpreted and applied the relevant provisions of national law.

15. On 6 September 2007, the Ministry of Justice rejected the applicant's request for damages pursuant to Act no. 82/1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Code of Civil Procedure (Act no. 99/1963 as in force at the relevant time)

16. Until 31 December 2002, the lawfulness of decisions of the administrative authorities could be reviewed by the courts in accordance with Part V of the Code of Civil Procedure (Articles 244-250s). On 27 June 2001 the Constitutional Court declared this part of the Code unconstitutional (judgment no. 276/2001).

17. Article 250a § 1 obliged a claimant who was not a lawyer by profession to be legally represented before the court.¹

18. Pursuant to Article 250f § 1f), the court was entitled to deliver a judgment without an oral hearing at the parties' suggestion or with their agreement. This provision read as follows:

“1. A court may decide on an action without holding a hearing by delivering judgment if

a) the impugned decision is non-reviewable for lack of intelligibility or for lack of grounds, or

b) the parties to the procedure have concurrently moved for or consented to this.

2. Consent under subsection 1b) shall be deemed granted also in the event that a party to the procedure does not, within 15 days of the service of the court's request, express an objection to the consideration of the case without a hearing. The party must be advised on the consequences.”

19. The relevant domestic law concerning the proceedings before the Constitutional Court is set out in the Court's judgment *Milatová and Others v. the Czech Republic*, no. 61811/00, §§ 39-44, ECHR 2005-V (extracts)).

1. Compulsory legal representation before the court of first instance was abandoned in the Code of Administrative Procedure (Act no. 150/2002) which entered into force on 1 January 2003.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE RIGHT TO A PUBLIC HEARING

20. The applicants complained that the national courts had not held a public hearing and had dealt with their case in their absence. They had not been informed about the date and place of the hearing held before the Regional Court and had been, therefore, denied an opportunity to present their comments on the defendant's proposal to dismiss their action. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal. ...”

21. The Government admitted that none of the tribunals involved in the applicants' case had held a public hearing and that none of the exceptions laid down in the second sentence of Article 6 § 1 of the Convention had been applicable. They submitted, however, that the Regional Court had acted within the ambit of Article 250f § 1 of the Code of Civil Procedure as in force until 31 December 2002, and when the applicants had not informed the court in time whether they would agree to dispensing with a public hearing, it had decided without holding a hearing in the case. The Government maintained that the applicants had been duly informed about their rights in the Regional Court's decision of 23 May 2002 which had been served on their representative on 24 May 2002. As the latter had been acting under a procedural power of attorney dated 26 April 2002, he had been the only person to whom the court's decision had had to be sent. The Government concluded that the applicants had waived their right to a public hearing.

22. Regarding the proceedings before the Constitutional Court, the Government maintained that they had been limited to examining questions of constitutionality and had not constituted a complete and direct assessment of the appellants' rights. Moreover, it had not been necessary for the applicants to express their views orally on the matter since their case had not been excessively complex.

23. The applicants maintained that they had not waived their right to a public hearing. Neither a request nor advice within the meaning of Article 250f of the Code of Civil Procedure had been served on them. The fact that the letter had been served on their counsel's son raised a question as to the date upon which it had been served. A mere legal fiction could not be an unequivocal waiver of right, and they had not intended to waive their right to a public hearing. Moreover, such an assumption could not be made in this

case since the request and the relevant advice had not been served on the applicants.

A. Admissibility

24. The Court notes that this complaint 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

25. The Court reiterates that the entitlement to a “public hearing” in Article 6 § 1 necessarily implies a right to an “oral hearing”. However, the obligation under Article 6 § 1 to hold a public hearing is not an absolute one. Thus, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest that would make a hearing necessary. A waiver can be done explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing (see, for example, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, § 66; and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 58). Furthermore, a hearing may not be necessary due to the particular circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see, *Martinie v. France* [GC], no. 58675/00, §§ 40-41, ECHR 2006-VI).

26. The Court observes that at the material time the Czech Code of Civil Procedure provided for an oral hearing before the courts dealing with an administrative action. However, the parties' attendance was not mandatory and, if a party did not reply to the court's request as to whether he or she agreed that the court proceed without holding a public hearing (see paragraphs 17-19 above), the court could decide without a hearing on the assumption that the applicants had agreed to such a procedure (see paragraph 11 above). The Court considers that these provisions were not, in themselves, incompatible with the fair trial guarantees of Article 6 § 1.

27. The Court further reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, e.g., *Multiplex v. Croatia*, no. 58112/00, § 44, 10 July 2003). It considers that the right to a public hearing would be devoid of substance if a party to the case were not apprised of the hearing in such a way so as to have an opportunity to attend it, should he or she decide to exercise the right to appear established in the domestic law.

28. Turning to the present case, the Court observes that the applicants were duly informed about their rights in the proceedings before the Regional Court in compliance with the relevant provisions of the Code of Civil Procedure then in force. Referring to the independence of the legal profession from the State, the Court notes that the fact that the Regional Court's notice of 23 May 2002 was collected by the son of the applicants' lawyer, who represented them on the basis of a valid procedural power of attorney, and who then failed to inform the court about his clients' position in respect of holding a public hearing, does not engage the responsibility of the State, the conduct of the defence being essentially a matter between the client and his counsel (see, *mutatis mutandis*, *Sejdovic v. Italy* [GC], no. 56581/00, § 95, ECHR 2006-II).

29. The foregoing considerations are sufficient to enable the Court to conclude that the applicants unequivocally waived their right to a hearing before the Regional Court. Moreover, it does not appear that the dispute in question raised any issues of public importance that would make a hearing necessary.

30. The Court finally observes that the proceedings before the Constitutional Court were also conducted without a public hearing. However, these proceedings, limited to the examination of questions of constitutionality, did not involve a direct and full determination of the applicants' civil rights in the administrative proceedings.

31. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION REGARDING THE FAIRNESS OF THE HEARING

32. The applicants further complained under Article 6 § 1 of the Convention that they had not been able to make comments on the written observations submitted by the presiding judge at the Regional Court, which had been used in the decision of the Constitutional Court.

33. The Government submitted that the written observations of the Regional Court had not contained any facts or claims on which the applicants could have submitted any relevant views, and that the procedural steps taken by the Constitutional Court, which had not sent those observations to the applicants, could not have influenced the outcome of the proceedings on their constitutional appeal. Besides, referring to the Court's judgment in the case *Milatová and Others v. the Czech Republic*, the Government left the assessment of the case to the Court's discretion.

34. The applicants maintained their complaints.

A. Admissibility

35. The Court notes that this complaint 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

36. The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to have made known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, § 24; *Milatová and Others*, cited above, § 59; *Spang v. Switzerland*, no. 45228/99, § 32, 11 October 2005; *Feliciano Bichão v. Portugal*, no. 40225/04, § 36, 20 November 2007; and recently, *mutatis mutandis*, *Salduz v. Turkey*, [GC], n° 36391/02, § 65, ECHR 2008). In the case of *Verdú-Verdú v. Spain* (no. 43432/02, 15 February 2007), adopted after the case of *Milatová and Others*, which concerned the lack of communication, in proceedings before the Constitutional Court, of pleadings of the public ministry in support of arguments submitted by the public prosecutor within the framework of the criminal proceedings brought against the applicant, the Court found that the pleadings in question could not have had any effect on the outcome of the proceedings before the Constitutional Court (§ 27).

37. The Court noted in *Milatová and Others* that, pursuant to section 42(4) of the Constitutional Court Act, the judge rapporteur is required to send a constitutional appeal lodged by an appellant to the other parties and, where appropriate, the joined parties, inviting them to submit written observations on the appeal, but that there is no corresponding obligation on the judge rapporteur to transmit any such observations to the appellant (§ 60). The Court dismissed the Government's argument that it was open to the applicants to consult the case file at the Constitutional Court and to obtain a copy of any written observations, finding it to be an insufficient safeguard to secure the applicants' right to an adversarial procedure. It stated that as a matter of fairness, it was incumbent on the Constitutional Court to inform the applicants that the observations had been filed and that they could, if they so wished, comment on them in writing (§ 61 with reference to *Göç v. Turkey* [GC], no. 36590/97, § 57, ECHR 2002-V).

38. The Court notes that the observations by the Regional Court were submitted in reply to the applicants' constitutional appeal and here,

therefore, related directly to the grounds of the appeal, namely the interpretation of the relevant provisions of the domestic law by the lower levels of jurisdiction, the examination of the lawfulness and accuracy of the administrative decision and the appropriateness of the Regional Court's decision to proceed without holding a hearing. The role of the Constitutional Court was to assess whether these allegations constituted a violation of the applicants' rights guaranteed, *inter alia*, by Articles 35 and 38 of the Charter and Articles 6 and 13 of the Convention (see paragraph 12 above).

39. The Court notes that the observations in question did not merely refer to the Regional Court's judgment, but constituted reasoned opinions on the merits of the applicants' constitutional appeal, manifestly aiming to influence the decision of the Constitutional Court by calling for the appeal to be dismissed. Thus, having regard to the nature of the issues to be decided by the Constitutional Court, it can be assumed that the applicants had a legitimate interest in receiving a copy of the written observations of the presiding judge at the Regional Court. The Court does not need to determine whether the omission to communicate these documents caused the applicants prejudice; the existence of a violation is conceivable even in the absence of prejudice. It is for the applicants to judge whether or not a document calls for their comments (see *Nideröst-Huber*, cited above, § 29). The onus was therefore on the Constitutional Court to afford the applicants an opportunity to comment on the written observations prior to its decision.

40. Accordingly, the procedure followed did not enable the applicants to participate properly in the proceedings before the Constitutional Court and thus deprived them of a fair hearing within the meaning of Article 6 § 1 of the Convention. There has therefore been a violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION REGARDING ACCESS TO COURT

41. The applicants also complained that unlike the defendant, they had had to be legally represented before the courts as provided for in Article 250a § 1 of the Code of Civil Procedure, which they found arbitrary.

42. The Court reiterates that the right of access to a court is not absolute and may be subject to legitimate restrictions which, however, should not impair the very essence of the right and where it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, e.g., *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, § 57).

43. Turning to the present case, the Court observes that the requirement of legal representation before the courts dealing with administrative actions applied until 31 December 2002. While this requirement was abandoned in the new Code of Administrative Procedure which entered into force on

1 January 2003, the Court is satisfied that the aim of that limitation was at the material time to prevent unqualified submissions being introduced by litigants, which aim pursued the legitimate aim of ensuring the proper administration of justice. Besides, the Court observes that the present applicants filed their administrative action in time without encountering any difficulty in finding a lawyer who would represent them in the proceedings before the Regional Court.

44. This part of the application is therefore manifestly ill-founded and has to be rejected under Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

45. The applicants further complained that they had not had any effective domestic remedies at their disposal as guaranteed by Article 13 of the Convention, which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

46. In view of its conclusions on Article 6 § 1 (see paragraphs 32 and 41), the Court considers that it is not necessary to examine the case under Article 13 since its requirements are less strict than, and are here absorbed by, those of Article 6 § 1 (see *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 106, *Reports* 1998-III).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicants claimed 10,000,000 Czech korunas (CZK) in respect of non-pecuniary damage.

49. The Government were of the opinion that should the Court find a violation of Article 6 § 1 of the Convention, that finding would constitute sufficient just satisfaction in respect of any non-pecuniary damage.

50. The Court does not discern any causal link between the violation found and the applicants' claim in respect of pecuniary damage. Further, it agrees with the Government that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage the applicants may

have sustained in the present case (see *Milatová and Others*, quoted above, § 70, and *Vokoun v. the Czech Republic*, no. 20728/05, 3 July 2008, § 33).

B. Costs and expenses

51. The applicants also claimed CZE 25,250 for the costs and expenses incurred before the domestic courts and before the Court.

52. The Government noted that the costs and expenses before the Regional Court had not been incurred in order to prevent or repair the alleged breach of the Convention and that the costs and expenses incurred before the Constitutional Court would be justified in the event of a finding of a violation of the applicants' right to a public hearing. The Government had no objection to the reimbursement of about CZK 9,500 for costs and expenses incurred in the proceedings before the Court.

53. 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 documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of 380 euros (EUR) for the proceedings before the Court.

C. Default interest

54. 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 complaint concerning the absence of a public hearing before the national courts in the applicants' case and the complaint concerning the failure to provide the applicants with the written observations filed by the Regional Court in the proceedings before the Constitutional Court admissible and the remainder of the application inadmissible;²

² Rectified on 30 March 2011: The text read ... 1. *Declares* the complaint concerning the failure to provide the applicants with the written observations filed by the Regional Court in the proceedings before the Constitutional Court admissible and the remainder of the application inadmissible; ... in the former version of the judgment.

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the complaint concerning the absence of a public hearing before the national courts in the applicants' case;³
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the complaint concerning the failure to provide the applicants with the written observations filed by the Regional Court in the proceedings before the Constitutional Court;⁴
4. *Holds* that there is no need to examine the case under Article 13 of the Convention;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;
6. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 380 (three hundred and eighty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into Czech korunas 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* the remainder of the applicants' claim for just satisfaction.⁵

Done in English, and notified in writing on 10 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

³ Rectified on 30 March 2011: The text read ... 2. *Holds* that there has been a violation of Article 6 § 1 of the Convention; ... in the former version of the judgment.

⁴ Rectified on 30 March 2011: This paragraph was missing in the former version of the judgment.

⁵ Rectified on 30 March 2011: Paragraphs 4, 5, 6 and 7 were numbered 3, 4, 5 and 6 in the former version of the judgment.