



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

FIFTH SECTION

CASE OF FLISAR v. SLOVENIA

(Application no. 3127/09)

JUDGMENT

STRASBOURG

29 September 2011

FINAL

29/12/2011

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

In the case of Flisar v. Slovenia,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 3127/09) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, Mr Borut Franc Flisar (“the applicant”), on 7 January 2009.

2. The applicant was represented by Mr L. Poljanec from Slovenska Bistrica. The Slovenian Government (“the Government”) were represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

3. The applicant alleged, in particular, that Article 6 § 1 of the Convention had been violated as he had not been heard by the judge who decided on his request for judicial review.

4. On 4 May 2010 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Martjanci.

6. At around 10 p.m. on 2 October 2006 the police, having been called, intervened at the home of the applicant’s half-sister P., who had been behaving in a violent and threatening manner towards their mother. The applicant arrived at the scene after the police officers. During the police

intervention, P. managed to escape together with her 8-year-old daughter. The applicant and the officers searched for P. In the meantime, she returned alone and refused to disclose her daughter's whereabouts. The applicant got upset and, according to the police statement, grabbed P.'s neck with one hand and slapped her with the other hand, in the presence of the police officers. He then calmed down and was informed by the officers of the minor offence he had committed. In accordance with the summary procedure under the Minor Offences Act (hereinafter the "MOA") he was fined 150,000 Slovenian tolar (approximately 625 euros (EUR)) for the offence of violent and aggressive behaviour. In his application to the Court the applicant maintained that he had assisted the officers and had been unjustifiably implicated in the situation.

7. Four days later, the applicant received written notice of the payment order issued by the police, which stated that he had committed a minor offence under section 6(4) of the Protection of Public Order Act and included a statement of facts which read as follows (in its entirety):

"The mentioned [person] was present at the incident involving his half-sister P. at home. Her conduct, insults and aggressive behaviour had upset him and for that reason he grabbed P.'s neck and slapped her across the face. After that act, he calmed down."

8. On 13 October 2006 the applicant lodged a request for judicial review. He alleged that his sister had been under the influence of alcohol and drugs, and had threatened and offended their mother and other people present, including the police officers. He also explained that P. had taken her child away in the car and had returned without her, refusing for a while to say where she had left her. The applicant and the officers had tried to convince her to disclose the child's whereabouts but P. had threatened the applicant and spat at him. After being provoked by her, the applicant, fearing for the child, had approached her and gently held her neck but had not slapped her. She had then revealed the whereabouts of the child and one of the officers had gone with her to pick him up. The applicant alleged that he had committed no offence and that he had not slapped P. In accordance with section 63 of the MOA the police forwarded the request for judicial review to the Murska Sobota Local Court.

9. On 26 May 2008 the Murska Sobota Local Court gave a judgment in which, relying on section 65(1) of the MOA, it rejected the applicant's request for judicial review as unsubstantiated and upheld the payment order. The applicant was ordered to pay EUR 62 for the costs of the proceedings.

10. As explained in the judgment, the court based its decision on the payment order and the statement of facts concerning the event, which the police submitted to the court at the same time as the request for judicial review. The court found as follows:

"the conduct of the defendant towards his sister which was observed by the police officers personally and directly was unjustified regardless of her mental and

physical state, which therefore leads the court to conclude that this [request for judicial review] is only an attempt at avoiding payment of the fine, since the court has no doubts as to the officers' findings."

11. On 23 June 2008 the applicant then lodged a constitutional appeal alleging that his constitutional rights had been violated. He complained, *inter alia*, of a violation of the right to a fair trial and presumption of innocence, alleged that the judge had decided only on the basis of the police file, that there had been no public hearing, that he had not had enough time to prepare his request for judicial review and that no appeal lay against the first-instance court's judgment.

12. Relying on section 55b(1)(3), read together with section 55a(2)(4) of the Constitutional Court Act, the Constitutional Court dismissed the appeal on 25 August 2008. The decision was served on the applicant on 30 August 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. For the relevant domestic law and practice see *Suhadolc v. Slovenia* ((dec.), no. 57655/08, 17 May 2011). In addition, the following domestic provisions are relevant to the present case.

14. Section 6 of the Minor Offences Act (Official Gazette no. 7/2003), referred to as the "MOA", defines an "offence" as any act that is against the law or in breach of a Government regulation or local self-government ordinance, and which is, as such, designated as a punishable minor offence. While the MOA contains some specific provisions concerning the elements of a minor offence and responsibility for such an offence, it also refers to provisions of the Penal Code, which are to be applied by analogy in minor-offence proceedings. In addition, the principle of the presumption of innocence is included in the MOA, which provides in section 7 that "persons accused of having committed minor offences are innocent until their responsibility is established by a final decision".

15. Under section 57, in cases where an officer observes the commission of the offence, or where the latter is established by special technical equipment, the authority may issue a "payment order" (*plačilni nalog*). The payment order has the same effect as the authority's decision. However, the measure of imprisonment for non-payment is not available when the fine was imposed by a payment order.

16. A judge can decide on the admissibility and merits of the request for judicial review on the basis of the file received from the administrative authority. Under section 65 of the MOA, the judge may reject the request in a judgment, if there is no need for further fact-finding and if the grounds for appeal are not established. This is done without hearing the applicant. If the judge finds that the facts were correctly established but that a different sanction should be imposed, he may uphold the request in part and modify

the administrative authority's decision accordingly. If a violation of procedural or substantive law is established or if further fact-finding is required, the judge quashes the decision and decides on the case in ordinary judicial proceedings to which the accused and the authority that issued the impugned decision are parties. In these judicial proceedings, the defendant has a right to be heard orally by the judge, to adduce evidence, to make procedural requests and to appeal against the judgment (sections 67, 69, 90, 114 and 119 of the MOA). Under section 125 of the MAO, the judge can, at his discretion, schedule a public hearing in ordinary judicial proceedings.

17. Section 6 of the Protection of Public Order Act (*Zakon o varstvu javnega reda in miru*, Official Gazette no. 70/2006, in force since 2 July 2006) reads as follows:

“(1) Any person who challenges or incites another person to fight, acts dangerously or violently, or insults or offends another person ... shall be punished with a fine of between 60,000 and 120,000 Slovenian tolar (SIT).

(2) A person who hits another person shall be punished with a fine of between SIT 80,000 and 150,000.

(3) The person who engages in a fight shall be punished with a fine of between SIT 100,000 and 300,000.

(4) If an offence listed in subsections (1)-(3) above is committed against ... a blood relative in the direct line ... , the offender shall be punished with a fine of between SIT 150,000 and 300,000 [EUR 625 to 1,251].”

18. The Constitutional Court Act (*Zakon o ustavnem sodišču*, Official Gazette no. 15/1994, as amended on 30 May 2007, Official Gazette no. 64/2007 – official consolidated version) provides in section 53 as follows:

“(1) A constitutional complaint must state the following:

- the decision which is challenged, the authority which issued it, its

reference number, and the date it was issued;

- the human rights or fundamental freedoms allegedly violated;

- the reasons that support the violations;

- the date on which the claimant was served the decision which he challenges;

- if the claimant is a natural person, the full name of the claimant and the address of his permanent or temporary residence, or, if the claimant is a legal entity, state authority, bearer of public authority, or other legal subject, its name and where it is based, as well as the name and title or position of its representative;

- other information determined by the Rules of Procedure of the Constitutional Court.

(2) The constitutional complaint must be submitted in writing. A copy of the challenged decision and all other decisions that were issued in connection with the challenged decision in proceedings before the competent authorities in the case, as well as the relevant documents on which the constitutional complaint is based, must be enclosed with the complaint.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 AS REGARDS THE LACK OF A HEARING

19. The applicant complained that he had not had an oral hearing, that the court did not examine witnesses, and that the judgment was based solely on the police file, in breach of his right to a fair hearing as provided for in Article 6 § 1 of the Convention, which reads as follows:

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

20. The Government contested that argument.

A. Admissibility

1. The parties' arguments

21. The Government argued that Article 6 was not applicable to the present case. Firstly, the offence in question was set out in the Protection of Public Order Act, and not in the Penal Code. The proceedings were governed by the MOA, and not the Criminal Procedure Act. Secondly, the sanction prescribed for the offence in question was a fine of between EUR 625 and EUR 1,251 and the entry of the conviction in a register of administrative offences for a period of three years. The sanction was not of a punishing nature, but was aimed at preventing the applicant from reoffending. There was no possibility of imprisonment in the present case. Finally, the Government submitted that the offence in question was of a general nature and concerned an undefined group of people.

22. The Government further pleaded non-exhaustion of domestic remedies submitting that the applicant had not advanced relevant arguments in his constitutional appeal indicating that his case had been of constitutional importance, which was one of the admissibility grounds.

23. In the alternative, the Government argued that the complaint should be rejected under Article 35 § 3 (b), submitting that the penalty had no

significant consequences for the applicant's life and that the case had been duly considered by the domestic court.

24. The applicant submitted that Article 6 should be applicable to the proceedings in question as he had been charged and convicted of an offence.

2. *The Court's assessment*

25. As regards the issue of applicability of Article 6, the Court recalls that in order to establish whether a person has been criminally convicted within the autonomous meaning of the Convention, it applies what is commonly known as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22, and, among other authorities, *Sergey Zolotukhin v. Russia*, [GC], no. 14939/03, § 53, 10 February 2009). The Court reiterates, in particular, that the lack of severity of the penalty imposed cannot divest an offence of its inherently criminal character.

26. Turning to the present case, the Court notes that the provisions of the MOA apply to the entire population and not to a group possessing a special status. Furthermore, although concerning "regulatory offences", the MOA refers to provisions of the Penal Code to be used by analogy (see paragraph 14 above). Finally, the applicant was given a fine of EUR 625, which was prescribed as a punishment (see paragraph 17 above) and not as compensation for the committed act. The Court has previously assessed cases in which similar types of "charges" were in question and found that they were "criminal" in nature (see, *mutatis mutandis*, *Öztürk v. Germany*, 21 February 1984, §§ 46-56, Series A no. 73; *Falk v. the Netherlands* (dec.), no. 66273/01, ECHR 2004-XI; and *Ziliberberg v. Moldova*, no. 61821/00, §§ 30-36, 1 February 2005). It sees no reason to reach a different conclusion in the present case. It therefore finds that the offence of which the applicant was accused and convicted may be classified as "criminal" for the purposes of Article 6 of the Convention.

27. As regards the Government's objection concerning non-exhaustion of domestic remedies, the Court observes that Article 35 § 1 requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements (see *İlhan v. Turkey* [GC], no. 22277/93, § 58, ECHR 2000-VII). The Court notes that the applicant, in line with the procedural rules, made the complaints to the Constitutional Court which he subsequently brought before the Court. The Government, however, argued that the applicant had not properly exhausted a constitutional appeal as he had not proven that his case concerned an important constitutional question. The Court does not find this argument convincing. Section 53 of the Constitutional Court Act sets out the elements that a constitutional appeal must contain (see paragraph 18 above) and the

element mentioned by the Government is not listed among them. It therefore dismisses this objection.

28. The Court also disagrees with the Government's argument that this complaint should be rejected under Article 35 § 3 (b). It notes that the applicant complained precisely about not having his case properly examined by the domestic courts. It also notes that the Constitutional Court did not deal with the applicant's complaints concerning an alleged breach of the guarantees of Article 6.

Therefore, and since this part of the application is not inadmissible on any other grounds, it must be declared admissible.

B. Merits

1. The parties' arguments

29. The applicant argued that he had been charged and convicted by the same body, namely the police, and that the judicial review of the process had been inadequate. He had not been afforded a hearing, nor had he been able to examine witnesses.

30. The Government argued that the applicant had had a fair trial with the possibility of an oral and public hearing at which the witnesses could have been cross-examined. The fact that he did not have such a hearing is not a result of a structural problem or deficiency in domestic legislation. A hearing had not been held because there had been no need for an oral presentation of the applicant's arguments. The applicant did not request an oral hearing or ask for any particular evidence to be examined by the court, nor did he submit arguments which would call for a hearing. In his request for judicial review, the applicant admitted in substance that he had grabbed P.'s neck. This was sufficient for the court to find that he had committed the respective regulatory offence. It would appear that the applicant's defence was based on the fact that he had been acting in defence of P.'s child. The court dismissed this argument. The remaining arguments concerned merely legal questions. The applicant therefore could not be said to have challenged the facts as established by the officers, neither did he challenge the legal qualification of his conduct or the sanction.

31. The Government further submitted that the police officer had conducted an oral procedure at the time of the incident, where the applicant had been immediately informed of the charges against him. A statement of key facts had also been drawn up by the police and sent to the applicant together with the payment order. The Government stressed that the procedure concerning a payment order was simplified in terms of the facts and legal qualification of the offence drawn up by the police.

32. Lastly, the Government submitted that oral hearings were held in minor-offence cases when it was so required by the circumstances of the

case, namely when facts had not been sufficiently established by the police or when the accused had had no opportunity during the police procedure to reply to the charges. In support of this argument, they submitted copies of twenty-four domestic judgments issued further to requests for judicial review by eight different local courts between 2005 and 2010. In most of the cases concerned by these judgments, the respective judge had heard the defendant and/or examined witnesses; in nineteen cases the defendant had been successful in his application. Acquittal had normally been based on the fact that the police had failed to prove the case. It appears that the hearing of the defendant and witnesses was, in most cases, performed as part of additional fact-finding carried out by the judge in ordinary judicial proceedings.

2. The Court's assessment

33. The Court reiterates that while entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the Convention, the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6 (*Lauko v. Slovakia*, 2 September 1998, § 64, *Reports of Judgments and Decisions* 1998-VI). It further reiterates that an oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, 25 February 1997, § 79, *Reports* 1997-I), and where an applicant has an entitlement to have his case “heard”, with the opportunity, *inter alia*, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses (*Jussila v. Finland* [GC], no. 73053/01, § 40, ECHR 2006-XIII).

34. The Court therefore notes that, according to its established case-law, the applicant was in principle entitled to a hearing before the first and only tribunal examining his case, unless there were exceptional circumstances which justified dispensing with such a hearing.

35. The Court has accepted such exceptional circumstances in cases not belonging to the traditional categories of criminal law, such as tax-surcharge proceedings (see *Jussila*, cited above) and proceedings concerning traffic offences such as speeding and driving under the influence of alcohol (see *Suhadolc*, cited above), where issues at stake were of a rather technical nature. In finding that the hearing was unnecessary the Court had regard to the fact that there had been no issues of credibility or contested facts which had necessitated an oral presentation of evidence or cross-examination of witnesses and that the accused had been given an adequate opportunity to put forward his case in writing and to challenge the evidence against him

(see *Jussila*, cited above, §§ 41-42 and 47-48, and *Andria Oy and Kari Karanko v. Finland* (dec.), no. 61557/00, 13 March 2007).

36. The present case concerns a regulatory offence under the Protection of Public Order Act, which, as such, does not belong to the traditional categories of criminal law (see, *mutatis mutandis*, *Kammerer v. Austria*, no. 32435/06, § 28, 12 May 2010, and *Öztürk*, cited above, § 51). It should now be examined whether, having regard to the manner in which the applicant's interests were actually presented and protected in the proceedings and particularly in the light of the nature of the issues to be decided by the local court, exceptional circumstances that could justify dispensing with a hearing existed in the present case.

37. The Court notes at the outset that the applicant did not make an explicit request for a hearing. However, under the MOA, as confirmed by the judgments submitted by the Government (see paragraph 32 above), an oral, and possibly public, hearing would be held if the judge decided that ordinary judicial proceedings should be conducted (see paragraph 16 above). This decision is taken at the judge's discretion (see *Suhadolc*, cited above). There is no provision in the MOA under which a defendant may request a hearing. In these circumstances and having regard to the principles concerning the waiver of the guarantees of a fair trial (see *Hermi v. Italy* [GC], no. 18114/02, §§ 73-76, ECHR 2006-XII), the Court does not consider that the applicant unequivocally waived his right to a hearing. It also notes that the applicant explicitly complained to the Constitutional Court about the lack of a hearing in his case (see, *mutatis mutandis*, *Baischer v. Austria*, no. 32381/96, § 26, 20 December 2001).

38. As regards the nature of the issues that were to be decided by the local court in the present case, the Court notes that unlike the case of *Suhadolc*, which concerned evidence obtained by means of an objective method, namely the use of a speed measuring device and an alcohol test, the present case concerns an offence of alleged violent and aggressive behaviour which was personally observed by the police officers. These observations by the officers were the sole basis of the applicant's conviction. The Court also notes that the entire summary procedure under the MOA was conducted by the officers at the time of the offence. Subsequently, the applicant received a payment order, which is equivalent to a conviction, with a very brief statement of facts. No written exchange of arguments was conducted before the case was brought to the local court, or later in the proceedings. The local court upheld the police's decision on the basis of the file forwarded by the police, which contained the payment order, the statement of facts and the applicant's request for judicial review (see paragraph 10 above).

39. In his request for judicial review, the applicant contested the conviction and challenged certain factual aspects of the case, including the credibility of certain police statements concerning his conduct. In view of

the foregoing, the Court finds that the local court could not, as a matter of fair trial, have properly determined the facts or the applicant's guilt without a direct assessment of the evidence at an oral hearing (see *mutatis mutandis*, *Hannu Lehtinen v. Finland*, no. 32993/02, § 48, and *Kallio v. Finland*, no. 40199/02, § 50, both of 22 July 2008).

40. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant complained under Article 6 of the Convention that the principle of presumption of innocence had been breached in his case and that no appeal lay against the local court's judgment. He further complained under Articles 6 and 13 of the Convention that the Constitutional Court had declined to examine his constitutional appeal and based its decision on section 55a of the Constitutional Court Act, which came into force after the event concerned in the constitutional appeal.

42. As regards the proceedings before the Constitutional Court, the Court has already dismissed an identical complaint in *Suhadolc v. Slovenia* (cited above) and finds no reason to reach a different conclusion in the present case. Having examined the remaining complaints, the Court finds, in the light of all the materials in its possession, and in so far as the matters complained of are within its competence, that they do not disclose any appearance of a violation of the Articles relied on by the applicant (see *ibid.*). It follows that 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 4,787 euros (EUR) in respect of pecuniary damage and EUR 4,000 in respect of non-pecuniary damage.

45. The Government contested the claim.

46. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

47. Moreover, with regard to the applicant's claim for non-pecuniary damage, the Court notes that where an individual, as in the instant case, has been convicted in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Nadtochiy v. Ukraine*, no. 7460/03, § 55, 15 May 2008). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction.

B. Costs and expenses

48. The applicant also claimed EUR 787 for the costs and expenses incurred in the domestic proceedings. The claim included the sum paid as a fine, an unidentified "voluntary contribution" and the sum the applicant paid in respect of costs for the proceedings before the local court.

49. The Government contested the claim.

50. 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.

C. Default interest

51. 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 lack of a hearing under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that the finding of violation is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President