



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

SECOND SECTION

CASE OF FRATANOLÓ v. HUNGARY

(Application no. 29459/10)

JUDGMENT

STRASBOURG

3 November 2011

FINAL

08/03/2012

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

In the case of Fratanoló v. Hungary,

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

Françoise Tulkens, *President*,

David Thór Björgvinsson,

Dragoljub Popović,

András Sajó,

Işıl Karakaş,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 11 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 29459/10) 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 Hungarian national, Mr János Fratanoló (“the applicant”), on 21 May 2010.

2. The applicant was represented by Mr G. Magyar, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged under Article 10 of the Convention that his prosecution for having worn a red star constituted a breach of his right to freedom of expression.

4. On 5 January 2011 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Pécs.

6. On 6 March 2008 the applicant, at the material time a member of the Hungarian Workers’ Party 2006 (*Munkáspárt 2006*), a registered left-wing

political party, was convicted by the Pécs District Court under section 269/B (1) of the Criminal Code of the offence of having displayed a totalitarian symbol in public. The court observed that the applicant had publicly worn a five-pointed red star while participating in a demonstration on 1 May 2004 celebrating Hungary's accession to the European Union and, at the same time, the International Workers' Day. As a sanction, the court issued a reprimand.

7. On appeal, on 23 September 2008 the Baranya County Regional Court reversed this judgment and acquitted the applicant. In holding that his act had represented in fact no danger to society, the Regional Court made reference *inter alia* to a judgment of the European Court of Human Rights, adopted on 8 July 2008, which had been introduced by another individual on account of a conviction similar in nature (*Vajnai v. Hungary*, no. 33629/06). In that judgment the European Court of Human Rights held that prosecution for having worn a red star amounted to a violation of that applicant's freedom of expression enshrined in Article 10 of the Convention.

8. In pursuit of the prosecution's further appeal, on 5 March 2010 the Pécs Court of Appeal reversed the second-instance judgment and upheld the applicant's conviction. It confirmed the reprimand and ordered the applicant to pay 7,500 Hungarian forints¹ in criminal costs. The Court of Appeal held that positive Hungarian law did not permit the domestic courts to apply the holding of *Vajnai* as such. It pointed out that the conditions of social dangerousness – which had been found by the Supreme Court to be absent in some, otherwise similar, cases – were indeed present in the instant circumstances. The court argued as follows:

“The common feature of those cases can be summarised as the absence of identification with the totalitarian symbol, in the first case more emphatically, and in the latter one by virtue of the perpetrator's indifference towards the symbol connected to the incriminated conduct.

The situation in the present case, however, was quite the contrary.

János Fratanoló used the five-pointed red star in a political context and as a sign of solidarity felt for his fellow party member, that is, because he identified himself with the symbol, with its meaning known and communicated to the outer world. In this context, the defendant's concrete political credo is irrelevant: the statutory provision prohibits everyone, irrespective of one's conviction, from the use of totalitarian symbols, including the five-pointed red star associated with Communist dictatorship. This statement remains true even if the symbol in question has dual meaning referring both to the totalitarian system mentioned above and to the international workers' movement promoting the ascendance of large groups of society. ...

The entirety of the elements of this offence is defined as the legal hypothesis of a so-called “conduct” (immaterial) crime. This means that the offence will be

¹ 30 euros

committed merely by performing the sanctioned conduct (dissemination, use in public or public display) and no further condition or result, let alone actual fear or anxiety caused to those perceiving, is required.”

The court concluded that the applicant’s act was indeed dangerous to society.

II. RELEVANT DOMESTIC LAW

9. Act no. IV of 1978 on the Criminal Code provides:

Section 10 (Definition of a criminal offence)

“(1) A criminal offence is an act perpetrated intentionally or – if the law also punishes negligent perpetration – by negligence, which represents a danger for society and for which the law orders the infliction of punishment.

(2) An activity or omission shall be an act dangerous to society if it violates or endangers the constitutional, social or economic order of the Republic of Hungary, or the person or rights of citizens.”

Section 269/B (The use of totalitarian symbols)

“(1) Any person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle-and-hammer or a five-pointed red star, or a symbol depicting any of them, commits an offence – unless a more serious crime has been committed – and shall be sentenced to a fine.

(2) The conduct prescribed under paragraph (1) is not punishable if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

10. The applicant complained that his conviction was a breach of his right to freedom of expression, enshrined in Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder ... [or] ... for the protection of the ... rights of others ...”

11. The Government contested that argument.

A. Admissibility

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

B. Merits

1. Where there has been an interference, whether it was “prescribed by law” and whether it pursued a legitimate aim

13. It has not been in dispute between the parties that there has been an interference with the applicant’s rights enshrined in Article 10 § 1 of the Convention; and the Court finds no reason to hold otherwise. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve those aims.

14. The parties have not addressed the legal basis of the interference or the legitimate aim it pursued. The Court observes that the restriction on the use of totalitarian symbols is prescribed by law, an Act of Parliament, which is sufficiently clear and met the requirements of foreseeability. It is therefore satisfied that the interference was indeed prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aims of the prevention of disorder and the protection of the rights of others.

2. “Necessary in a democratic society”

(a) The parties’ arguments

i. The Government

15. The Government argued, and submitted an example, that whenever the element of danger to society, a constitutive feature of an offence, could not be established in a case otherwise similar to that of the applicant, the domestic courts acquitted those defendants. The absence of danger to

society in such cases flowed from the absence of the defendants' identification with the totalitarian symbol in question. The situation in the present case, however, was quite the contrary. The applicant had used the five-pointed red star in a political context, as a sign of solidarity with a fellow party member, that is, because he had identified himself with the symbol and with what it means to the outside world. His own political conviction was immaterial since the law prohibited everyone from the use of totalitarian symbols, including the five-pointed red star associated with Communist dictatorship, whether or not possessing multiple meanings.

16. According to the final judgment given by the Pécs Court of Appeal, the aim, in the pursuit of which the symbol was displayed, was irrelevant. To require an examination of the aim and an exploration of the perpetrator's inner conviction would result in the unrestricted use of the symbols by anyone for any purpose. However, where identification between the perpetrator and the symbol existed, the mere use of the prohibited symbols could create a sense of threat and fear in others. Indeed, the offence in question was so-called 'conduct offence' meaning that by performing the sanctioned conduct the offence was committed without any further criteria or specific result being necessary. The court had pointed out that the defendant had worn the red star, obviously with political motivation, in the street in the midst of an assembly of many people and while television had been interviewing him. For the spectators, it had not been possible to appreciate the defendant's reasons for this conduct, but it had been obvious that the bearer of the symbol had identified himself therewith and had in this way represented a danger to society. Concerning the issue of proportionality, the Government further drew attention to the fact that the applicant had been sanctioned only with a reprimand.

ii. The applicant

17. The applicant submitted that there was little scope for restrictions on the rights enshrined in Article 10 when political expression or public debate was in question. In his view, the restriction imposed on him was not justified under paragraph 2 of that provision.

18. He argued that the Government had not shown that wearing the red star exclusively meant an identification with totalitarian ideas, especially in the light of the fact that the applicant had done so in his capacity of chairman of the Hungarian Worker's Party 2006, a registered political party with no known intention of participating in Hungarian political life in defiance of the rule of law. He had worn the red star as a logo at a peaceful and lawful political event organised by the National Federation of Hungarian Trade Unions on 1 May 2004. The aim of the event had been to celebrate Hungary's accession to the European Union and, at the same time, the International Workers' Day.

19. The applicant stressed that he had used the red star to express his political views, namely his affiliation with Communism, the international workers' movement and also to demonstrate his solidarity with a fellow party member who had been prosecuted for having worn the red star. Using the red star in that context could hardly create a sense of threat or fear in anyone. An indiscriminate ban on totalitarian symbols without any proof being required that their display amounted to totalitarian propaganda could not be considered to have responded to a pressing social need.

(b) The Court's assessment

i. General principles

20. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

21. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

22. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient", and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

23. The Court further reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend,

shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society” (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). Although freedom of expression may be subject to exceptions, they “must be narrowly interpreted” and “the necessity for any restrictions must be convincingly established” (see, for instance, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

24. Furthermore, the Court stresses that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest (see *Feldek v. Slovakia*, no. 29032/95, § 74, ECHR 2001-VIII; and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). In the instant case, the applicant’s decision to wear a red star in public must be regarded as his way of expressing his political views. The display of vestimentary symbols falls within the ambit of Article 10.

ii. Application of those principles to the present case

25. The Court has outlined its approach to the application of the above principles in the context of the display of the five-pointed red star in the case of *Vajnai v. Hungary* (no. 33629/06, §§ 48 to 58, July 2008). It held that, for a restriction on the display of that symbol to be justified, it was required that there was a real and present danger of any political movement or party restoring the Communist dictatorship. However, the Government had not shown the existence of such a threat prior to the enactment of the ban in question. The Court perceived a risk that a blanket ban on the use of that symbol might also restrict its use in contexts in which no restriction would be justified. It therefore considered that the ban in question was too broad in view of the multiple meanings of the red star: it could encompass activities and ideas which clearly belonged to those protected by Article 10, and there was no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law did not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship. The Court furthermore stressed that even the potential propagation of Communist ideology could not be the sole reason to limit the display of the red star by way of a criminal sanction. However, in any case, a symbol which might have several meanings in the context of the case of *Vajnai*, where it had been displayed by a leader of a registered political party with no known totalitarian ambitions, could not be equated with dangerous propaganda.

26. The Court is satisfied that the present application does not substantially differ from the *Vajnai* case and that the considerations

underlying that judgment are equally valid in the present context. Just like Mr Vajnai, the applicant wore the symbol in question as a member of a registered political party and at a lawful demonstration. That display formed therefore part of his political expression and as such enjoyed the protection of Article 10. Indeed, the only element which may distinguish the present application from the *Vajnai* case is the Government's submission that the applicant's conduct represented danger to society because it symbolised his identification with totalitarian ideas (see paragraph 15 above). However, the Court considers that it is not called upon to examine the purported justification for the interference in question from this perspective, since the Government admitted (see paragraph 16 above) that the sanction had been applied merely on account of the display itself, without any judicial scrutiny of its dangerousness having taken place. For the Court, the applicant has thus been subjected to the same indiscriminate restriction as Mr Vajnai.

27. The Court has already established that, for the interference to be justified, the Government must show that wearing the red star exclusively means identification with totalitarian ideas, especially in view of the fact that the applicant did so at a lawfully organised, peaceful demonstration. However, the position of the Court of Appeal (see paragraph 8 above) expressly denies the necessity of an examination of the context in which the impugned expression appears. Therefore, no meaningful distinction can be made between those shocking forms of expression which are protected by Article 10, and unjustifiably offensive ones which forfeit their right to tolerance in a democratic society. The Court would note in particular that the Court of Appeal did not even analyse if the expression had resulted in intimidation (cf. the above-mentioned *Vajnai* judgment, § 53). In the absence of a scrutiny of the proportionality of the interference, as precluded by the interpretation of the Court of Appeal, the Court cannot find that the Government have proven that the restriction corresponded to a "pressing social need".

28. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

31. The Government contested this claim.

32. The Court considers that the applicant must have suffered some non-pecuniary damage and awards him, on the basis of equity, EUR 4,000.

B. Costs and expenses

33. The applicant also claimed EUR 2,400 for the costs and expenses incurred before the Court. This amount corresponds, as per a time-sheet submitted, to the legal fees billable by his lawyer at an hourly rate of EUR 200 plus 25% VAT in respect of altogether 10 hours of legal work.

34. The Government contested this claim.

35. 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 considers it reasonable to award the full sum claimed.

C. Default interest

36. 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 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

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

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

Stanley Naismith
Registrar

Françoise Tulkens
President