



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

FOURTH SECTION

CASE OF STOYANOV v. BULGARIA

(Application no. 39206/07)

JUDGMENT

STRASBOURG

31 January 2012

FINAL

30/04/2012

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

In the case of Stoyanov v. Bulgaria,

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

Lech Garlicki, *President*,

David Thór Björgvinsson,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 10 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 39206/07) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Bulgarian national, Mr Aleksandar Tonev Stoyanov (“the applicant”), on 17 August 2007.

2. The applicant was represented by Mr Y. Grozev, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

3. The applicant alleged, in particular, that he had been convicted *in absentia* without having had the opportunity to have the proceedings reopened, and that his imprisonment was unlawful.

4. On 12 April 2010 the President of the Fifth 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 case was later transferred to the Fourth Section of the Court, following the re-composition of the Court’s sections on 1 February 2011.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and is currently serving prison sentences in Varna prison.

1. The events of 23 September 2002

6. According to the indictment filed against the applicant in December 2003, in the evening of 23 September 2002 it was alleged that he had held a party with his girlfriend and four other individuals. He drank a lot and became jealous. Later, while he and his girlfriend were in another room, witnesses heard a shot. They went to the room and saw the victim lying in a pool of blood. It was alleged that the applicant was holding a pistol and told them he had shot her. Then he got into the car of an acquaintance of his, together with two of the witnesses, threatened the driver with the pistol and forced him to drive him out of town. After some time he asked the driver to stop and then ran away. According to the indictment, the witnesses informed the police.

2. Steps taken by the authorities to find the applicant

7. The applicant had been sought by the police since 29 July 2002 in connection with previous criminal proceedings.

8. After the murder of 23 September 2002, the applicant was not found at his permanent address. Following inquiries by an investigator at the Haskovo regional investigation service, it became clear that he was not in prison and had not left the country. On 14 November 2002 the investigator ordered the police to find and bring the applicant before him. There is no information whether the police took any measures in pursuance of the order.

3. The criminal proceedings against the applicant

9. On 24 September 2002 a preliminary investigation was opened on suspicion that the applicant had intentionally shot dead his girlfriend, after which he had forced a witness to drive him away and had gone into hiding.

10. On 20 November 2003 the investigator established that the applicant's whereabouts were unknown, appointed a lawyer to represent him and charged him *in absentia* with intentional murder and coercion. The results of the preliminary investigation were presented to the applicant's officially appointed lawyer, who did not make any objections or requests for additional evidence to be obtained.

11. On an unspecified date in December 2003 the Haskovo regional prosecutor's office filed an indictment against the applicant with the Haskovo Regional Court.

12. The Regional Court tried to summon the applicant at his permanent address. The summons was returned undelivered with information from the applicant's father to the effect that the applicant had left the address two years ago. After an inquiry, it was again established that the applicant was not in prison and had not left the country. Therefore, the Regional Court assigned counsel to represent the applicant during the trial.

13. In a judgment of 7 July 2004 the Regional Court convicted the applicant as charged, sentenced him to sixteen years' imprisonment and allowed a civil claim brought by the victim's mother in the amount of 25,000 leva (BGN) (12,783 euros: EUR). The judgment was based on witness testimonies, expert reports and an inspection of the crime scene. The applicant's court-appointed lawyer did not appeal against the judgment and it became final.

4. The applicant's detention

14. On 11 April 2006 the applicant was arrested and taken to Varna prison to start serving a previously imposed sentence. At that time he had already received prison sentences in at least four sets of criminal proceedings, with terms of imprisonment varying from one to ten years. According to a letter from the prison authorities, on 11 November 2008 the Sofia District Court, applying Articles 25 and 27 of the Criminal Code, cumulated the sentences given in three sets of criminal proceedings, including the proceedings *in absentia*. It joined in its entirety the sixteen-year sentence imposed *in absentia* to the outstanding parts of the other sentences and thus determined an aggregate punishment of twenty years, three months and two days' imprisonment, starting from 11 November 2008. Four years were to be deducted from this period by virtue of the Amnesty Act, which, according to the prison authorities, was applicable in respect of an unspecified previous offence committed by the applicant.

5. The applicant's request for a reopening of the criminal proceedings

15. On 10 October 2006 the applicant submitted a request for a reopening of the criminal proceedings held *in absentia*. He stated that he had learned about the criminal proceedings against him on 11 April 2006, when he had been arrested and sent to prison. He further maintained that his right to defence had been violated because no psychiatrist had been appointed to assess his mental state at the time of the incident and no fingerprint sample had been taken from him. He also stated that he had been denied the right to the effective assistance of counsel, because the lawyer assigned to him had not taken any steps in his defence and had not appealed against the judgment of 7 July 2004.

16. In a judgment of 1 March 2007 the Supreme Court of Cassation dismissed the applicant's request. The court held that under Article 423 of the 2006 Code of Criminal Procedure a reopening was only possible where the convicted person had been unaware of the criminal proceedings against him for reasons beyond his control. It noted, however, that the applicant had left the scene of the crime and had failed to inform the authorities of his current address. Therefore the fact that he had not been aware of the criminal proceedings against him was a consequence of his own conduct.

The court concluded that by fleeing and failing to inform the authorities of his whereabouts the applicant had given up his procedural rights of his own free will. As to the applicant's court-appointed lawyer, the court found that he had not breached his duties, his failure to appeal against the judgment of 7 July 2004 having been based on a careful assessment of its fairness and lawfulness.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Trials in absentia

17. The 1974 Code of Criminal Procedure ("CCP"), in force until 29 April 2006, allowed trials *in absentia*, *inter alia*, where the place of residence of the accused was unknown and had not been established after diligent tracing (Article 268 § 3 (2)).

18. The new 2006 CCP, in force since 29 April 2006, provided for the reopening of criminal cases heard *in absentia* where the convicted person had been unaware of the proceedings against him and had submitted a request for reopening within six months of learning about the conviction (Article 423 § 1).

19. Pursuant to the established case-law of the Supreme Court of Cassation, a person convicted *in absentia* was entitled to a reopening of the criminal proceedings only if he had been denied the right to participate in those proceedings for reasons beyond his control.

20. On 23 December 2008, Article 423 § 1 of the 2006 CCP was amended to extend the scope of cases in which reopening was allowed. In particular, it provided that reopening might be refused if the convicted person had failed to appear at the trial stage or had absconded, despite having been informed of the indictment against him and of the possible consequences of his absence.

2. Reopening of proceedings following a judgment of the European Court of Human Rights

21. Pursuant to Article 422 § 1 (4) of the 2006 CCP, the criminal proceedings are reopened when a judgment of the European Court of Human Rights establishes a violation of the Convention which is of particular importance for the case. The Chief Public Prosecutor shall make the request within one month of becoming aware of the judgment (Article 421 § 2 of the 2006 CCP). The request is examined by the Supreme Court of Cassation (Article 424 of the 2006 CCP).

3. *Aggregate punishment*

22. Pursuant to Articles 23 and 24 of the Criminal Code, an aggregate punishment is imposed on a person who has committed two or more offences and has not yet been convicted of any of them, by absorption of the less severe punishments by the most severe one. Where the punishments are of the same type, the most severe punishment may be increased by up to fifty percent. According to Article 25 of the Criminal Code, the same rules apply when the person has already been convicted of two or more offences with individual sentences.

23. Pursuant to Article 27 of the Criminal Code, where a person has committed an offence after having been sentenced to imprisonment for another offence but before having served his sentence, an aggregate punishment is imposed by joining, fully or in part, the new prison sentence to the outstanding part of the previous sentence. Where the new prison sentence is for a term of more than five years, it is joined without any reduction.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complained that he had been convicted *in absentia* without having had the opportunity of presenting his defence before the courts and without the effective assistance of counsel, and that he had been denied a retrial. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which provide:

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

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

A. The parties’ submissions

1. The Government

25. The Government submitted that the applicant had deliberately sought to escape trial. They argued that since he had gone into hiding immediately after the commission of the offences, his ignorance of the criminal proceedings conducted against him had been due to his own misconduct. They concluded that he had waived his right to appear in court, a fact which had been unequivocally established by the domestic authorities. They further stated that the authorities had sought the applicant at his known addresses and had made inquiries about his whereabouts with the prison authorities and in the border control database.

2. The applicant

26. The applicant stated that he had never waived, either expressly or tacitly, his right to appear and defend himself in court. He argued that he had learned of the criminal proceedings against him when he had been detained on 11 April 2006. Before that date, he had only been aware that the authorities were looking for him in order to enforce a previous sentence. Furthermore, he stated that the Supreme Court of Cassation had not established in an unequivocal manner that he had waived his right to the safeguards of a fair trial. Finally, he complained that he had not had the effective assistance of counsel.

B. The Court’s assessment

1. Admissibility

27. 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.

2. Merits

28. A statement of the general principles concerning trials *in absentia* may be found in the Court’s judgment in the case of *Sejdovic v. Italy* [GC], no. 56581/00, §§ 81-95, ECHR 2006-II.

29. The Court notes that it is not disputed between the parties that the applicant did not receive any official notification about the criminal investigation opened against him or about the date of his trial. After the opening of the murder investigation, the authorities made several unsuccessful attempts to locate the applicant at his permanent address, in detention facilities and in the border control database. They ultimately decided that the criminal proceedings brought against him would be conducted in his absence (see paragraphs 10 and 12 above). The Supreme Court of Cassation also confirmed that the applicant had not been officially informed of the proceedings instituted against him (see paragraph 16 above).

30. According to the Government, the applicant went into hiding immediately after the murder and therefore, in their opinion, lost his entitlement to a new trial as he had sought to evade justice. The applicant maintained that all that he had known was that he had been sought by the authorities in connection with a previous sentence.

31. The Court has not ruled out the possibility that, in the absence of official notification, certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces (see *Sejdovic*, cited above, § 99). Such circumstances are to be distinguished from the outright fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted, which are not sufficient to justify the assumption that the accused was aware of the proceedings for the determination of the charges against him and has waived his right to appear in court. An assumption of that kind would risk undermining the very concept of the right to a public hearing within the meaning of Article 6 § 1 of the Convention as well as the notion of an effective defence guaranteed under Article 6 § 3 of the Convention, which includes the right of the accused to be informed promptly of the nature and cause of the charges against him, to have adequate time and facilities for the preparation of the defence and to examine or have examined witnesses against him.

32. For a trial in absentia to be justified, what is decisive is whether the facts of the case show unequivocally that the applicant was sufficiently aware of the opportunity to exercise these rights in the context of the

specific proceedings instituted against him and whether he might be considered to have waived his right to appear in court. In the absence of any notification this right can neither be seen to have been clearly waived nor exercised effectively.

33. In the Court's view, no such circumstances have been established in the instant case. In this respect the present case discloses no material difference from the case of *Sejdovic*, cited above. The mere absence of the applicant from his home is insufficient to consider that he was aware of the proceedings and, consequently, had absconded (see *Shkalla v. Albania*, no. 26866/05, § 73, 10 May 2011, *Hu v. Italy*, no. 5941/04, § 55, 28 September 2006, and *Sejdovic*, cited above, § 100). The Government's argument is not based on any objective factors viewed in the light of the evidence against the applicant; it assumes that the applicant was responsible for the killing of his girlfriend. As in *Sejdovic*, the Court is unable to accept this argument, which also runs counter to the presumption of innocence.

34. In previous cases concerning convictions *in absentia* the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (see *T. v. Italy*, 12 October 1992, § 28, Series A no. 245-C, and *Somogyi v. Italy*, no. 67972/01, § 75, ECHR 2004-IV). In the instant case it has not been shown by the respondent Government that the applicant had sufficient knowledge of the investigation opened on 24 September 2002 and the concrete charges brought against him on 20 November 2003.

35. Accordingly, in order for the proceedings leading to his conviction to not represent a "denial of justice", the applicant should have had the opportunity to have them reopened and the merits of the murder charges against him, as well as any possible punishment, determined in his presence (*Stoichkov v. Bulgaria*, no. 9808/02, § 57, 24 March 2005, and *Sejdovic*, cited above, § 84).

36. As this did not happen in the present case, there has therefore been a violation of Article 6 of the Convention.

37. This finding makes it unnecessary for the Court to examine the applicant's allegations that the defence conducted by his court-appointed lawyer was defective (see *Sejdovic*, cited above, § 107).

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

38. The applicant complained that his imprisonment after 22 April 2009, when he had allegedly started serving the sentence imposed on him *in absentia*, had been unlawful and arbitrary. He relied on Article 5 § 1 (a) of the Convention, which provides:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court; ...”

A. The parties’ submissions

1. The Government

39. The Government insisted that the applicant had deliberately sought to escape trial and thus had waived his right to appear in court, and therefore the criminal proceedings against him and the subsequent refusal of the Supreme Court of Cassation to grant a retrial had been lawful. They concluded that the applicant’s imprisonment had been in compliance with Article 5 § 1 (a) of the Convention.

2. The applicant

40. The applicant stated that on 11 April 2006 he had been arrested and sent to prison to serve a previously imposed sentence, which had expired on 22 April 2009. He maintained that after the latter date he had been serving the sentence imposed following the proceedings conducted *in absentia*. Referring to the Court’s judgment in the case of *Stoichkov* (cited above), he considered that the criminal proceedings against him, coupled with the impossibility to obtain a fresh determination of the charges against him, had been manifestly contrary to the provisions of Article 6, and therefore his detention after 22 April 2009 was not justified under Article 5 § 1 of the Convention.

B. The Court’s assessment

1. Admissibility

41. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

2. Merits

42. The Court’s views on the general principles concerning the lawfulness of detention under Article 5 § 1 (a) of the Convention, and in particular, detention based on a sentence imposed *in absentia* in flagrant denial of justice, may be found in the judgment in the case of *Stoichkov*, cited above, § 52.

43. The Court notes that the applicant was detained on 11 April 2006 on the basis of a previous “conviction by a competent court” (see paragraph 14 above). Subsequently, an aggregate punishment of more than twenty years’ imprisonment was imposed on the basis of several final prison sentences, including the one delivered in the proceedings *in absentia* (ibid.). On the basis of the materials before it, the Court is unable to conclude that at the time of adoption of the present judgment the applicant would have completed serving his aggregate punishment but for the sentence imposed in the impugned trial *in absentia*. It further notes that the lawfulness of the other sentences imposed on the applicant, among which there was, notably, a ten-year prison sentence, has not been disputed. Therefore, he has failed to establish that at present the violation of Article 6 found above should be seen as necessarily resulting in an unjustified deprivation of liberty contrary to Article 5 § 1 (a).

44. It follows that there has been no violation of Article 5 § 1 of the Convention.

III. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

45. Articles 41 and 46 of the Convention provide:

Article 41

“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.”

Article 46

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

A. Damage

46. The applicant maintained that the most appropriate form of redress for the violation of Article 6 of the Convention would be a retrial or reopening of the proceedings without delay. He further claimed 5,000 euros (EUR) for non-pecuniary damage in respect of the violation of Article 6.

47. The Government contested this claim.

48. The Court reiterates that where a violation of Article 6 is found, the applicant should, as far as possible, be put in the position that he would have been in had the requirements of that provision not been disregarded,

and that the most appropriate form of redress would, in principle, be a retrial or the reopening of the proceedings, if requested (see *Kounov*, cited above, §§ 58-59, with further references). It notes, in this connection, the power of the Chief Public Prosecutor under Articles 420-422 of the 2006 CCP to request the reopening of proceedings following a judgment of this Court (see paragraph 21 above).

49. As regards the claim for non-pecuniary damage, the Court considers that its finding of a violation constitutes sufficient just satisfaction in the circumstances of the present case (see *Kounov*, cited above, § 60).

B. Costs and expenses

50. The applicant also claimed EUR 1,600 for 16 hours of legal work by his lawyer in the proceedings before the Court, at the hourly rate of EUR 100. In support of this claim he presented a contract and a timesheet. He requested that any award made by the Court under this head be made payable to his lawyer, Mr Y. Grozev.

51. The Government considered that the claims were excessive.

52. 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 entire amount claimed by the applicant under this head, plus any tax that may be chargeable to him. That amount is to be paid into the bank account of the applicant's lawyer, Mr Y. Grozev.

C. Default interest

53. 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* that there has been no violation of Article 5 § 1 of the Convention;

4. *Holds* that the finding of a violation of Article 6 § 1 constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. *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 1,600 (one thousand six hundred euros), to be converted into Bulgarian leva at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of the applicant's representative, Mr Y. Grozev;
 - (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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President